UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Felicia Burch, Scott Bloom, Matthew Burch, Jeffrey Ehlenz, Carol Gabriele, Nicole Graham, Jeffrey Kosek, Karen Zeeb, David Howard, Colleen Kist, Ronald Schneberger and Gena Margason, on behalf of themselves and other individuals similarly situated,

No. 06-CV-3523-MJD/AJB

Plaintiffs,

v.

Qwest Corporation,

Defendant.

Darcy Jones and Paul Larsen, individually and on behalf of all others similarly situated,

No. 07-CV-2979-MJD/AJB

Plaintiffs,

v.

Qwest Communications International Inc., a Delaware corporation, Qwest Communications Corporation, a Colorado corporation, and Qwest Corporation, a Delaware corporation,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS AND PLAINTIFF SERVICE PAYMENTS

In connection with the Joint Motion for Final Approval of the Settlement, Plaintiffs move the Court to approve Class Counsel's requested fees and costs incurred in litigating this matter. This motion also requests approval of service payments to Named Plaintiff Felicia Burch and the 41 plaintiffs who were deposed by Defendants ("Qwest").

The Settlement Agreement allows Class Counsel to request payment of attorneys' fees in the amount of one-third of the total settlement amount, costs incurred in this litigation and expenses associated with administering the settlement. Class Counsel, by this motion, makes such a request for payment of $1,566,666.67 in attorneys' fees, $535,540.42 in costs and $5,912.16 in costs related to settlement administration. Qwest does not oppose this request. For all the reasons set forth below, Plaintiffs respectfully request that the Court grant Plaintiffs' motion.[1]

I. THE COURT SHOULD APPROVE AN AWARD OF ONE-THIRD OF THE COMMON FUND.

Pursuant to Federal Rule of Civil Procedure 23(h), the Court "may award reasonable attorney's fees and nontaxable costs . . . authorized by law" in a class action. Section 216(b) of the Fair Labor Standards Act states that the court "shall...allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). What constitutes a reasonable fee is within the sound discretion of the district court. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1157 (8th Cir. 1999). The use of a percentage method of awarding

[1] Through this motion, Class Counsel seeks attorneys' fees related to both Burch v. Qwest Corp., No. 06-CV-3523-MJD/AJB ("Burch") and Jones v. Qwest Corporation et. al., No. 07-CV-2979-MJD/AJB) ("Jones").

attorney fees in a common-fund case is well established in both Rule 23 class actions and FLSA collective actions. See, e.g., Petrovic, 200 F.3d at 1157 (approving the percentage method in a class action); Peterson v. Mortgage. Sources, Corp., No. 08-2660-KHV, 2011 WL 3793963, at *9 (D. Kan. Aug. 25, 2011) (approving the percentage method in an FLSA collective action); Yarrington v. Solvay Pharms., Inc., 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (approving the percentage method in a class action); In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig., 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (noting that there are strong policy reasons behind the judicial and legislative preference for the common fund because "it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.") (quotation omitted). When considering a reasonable percentage of the common fund to award as attorneys' fees, the lodestar method (the reasonable number of hours billed multiplied by the appropriate hourly rates) can serve as a cross-check. See Petrovic, 200 F.3d at 1157; Sanderson, 2011 WL 6369395, at *2.

A. Class Counsel Is Requesting a Reasonable Percentage of the Recovery.

The Eighth Circuit has not established specific factors that a court must consider when determining the reasonable percentage to award as attorneys' fees in a common fund case, but courts within this district have considered the following applicable factors:

1. the benefit conferred on the class;
2. the risk to which plaintiffs' counsel was exposed;
3. the difficulty and novelty of the legal and factual issues of the case;
4. the skill of the lawyers;
5. the time and labor involved;

6. the reaction of the class; and
7. the comparison between the requested fee percentage and percentages awarded in similar cases.

See, e.g., Yarrington, 697 F. Supp. 2d at 1061; In re Xcel, 364 F. Supp. 2d at 993.

1. Class Counsel Achieved a Substantial Settlement on Behalf of Plaintiffs in This Litigation.

When determining the reasonableness of attorneys' fees, "the most critical factor is the degree of success obtained." Hensley, 461 U.S. at 436; see also Wheeler v. Mo. Transp. Comm'n, 348 F.3d 744, 754 (8th Cir. 2003); In re Xcel, 364 F. Supp. 2d at 994. Here, Class Counsel achieved a substantial settlement amount of $4,711,537. In negotiating the settlement, Class Counsel took into consideration the risks associated with a lengthy trial jury trial, as well as likely appeals and post-trial motions. Rather than continue further down this litigation path, the proposed settlement confers a substantial and immediate benefit to the FLSA Plaintiffs and Rule 23 Plaintiffs.

2. Class Counsel Undertook Considerable Risk in Litigating this Case.

The risk of litigation and the possibility of receiving nothing is a "major factor" in awarding attorneys' fees. Yarrington, 679 F. Supp. 2d at 1062; In re Xcel, 364 F. Supp. 2d at 994. Class Counsel took this case solely on a contingency fee basis and has not been compensated for any time or expense since the litigation began in August 2006. (Desai Decl. at ¶ 3.) The inherent facts and circumstances presented hurdles to a successful recovery of unpaid wages. As to certification, if the case had not settled, Plaintiffs risked a favorable outcome for Qwest on its motions to decertify the Rule 23 classes and FLSA collective pending at the time of settlement. Further, if the case had not settled, trial was quickly approaching, and Plaintiffs risked receiving little to no relief after trial and any associated appeals.

3. The Legal and Factual Issues are Difficult and Complex.

This matter involved 2,809 current and former Sales Consultants and Sale and Service Consultants employed by Qwest. (Desai Dec. ¶ 4.) The case has been extensively litigated since it was filed in August 2006 and involves several issues under the FLSA, and Minnesota, Colorado, Oregon, and Washington state laws. These issues include whether: 1) Plaintiffs worked off-the-clock without overtime compensation; 2) Qwest had actual or constructive knowledge of the work that Plaintiffs allege was uncompensated; 3) Plaintiffs' uncompensated work was *de minimus*; 4) liquidated damages were appropriate; 5) Qwests' actions were willful; and, 6) collective and class certification under the FLSA and corresponding state laws was appropriate. These issues are complex and involve significant factual and legal analyses under federal and state law.

4. Class Counsel is Highly Skilled and Experienced in Wage and Hour Class and Collective Action Litigation.

Courts throughout the Eighth Circuit recognize the importance of competent representation when determining the reasonableness of a fee award. See, e.g., Sanderson, WL 6369395, at *2; Zilhaver v. UnitedHealth Grp., Inc., 646 F. Supp. 2d 1075, 1083 (D. Minn. 2009); In re: Xcel, 364 F. Supp. 2d at 995-96. Class Counsel has extensive experience and expertise in prosecuting wage-and-hour collective and class-action cases on behalf of employees. (See Kaster Decl. at ¶¶ 3-8; Desai Decl. at ¶ 5.) Class Counsel used this experience to litigate this action and ultimately to reach a fair resolution.

5. Class Counsel Expended Extensive Time and Labor on Behalf of Plaintiffs and the Classes for over Six Years.

Over the past six years, Class Counsel has spent over 9,600 hours litigating this case. (Desai Decl. at ¶ 6.) The settlement could not have been possible without Class Counsel's efforts in prosecuting Plaintiffs' claims. The Parties took over 75 depositions, comprising of 30(b)(6) depositions of Qwest, Plaintiff depositions and depositions of Plaintiffs' supervisors. (Id.) Moreover, Class Counsel interviewed Plaintiffs and class members to obtain details regarding their claims, answered written discovery, and the Parties exchanged thousands of documents. (Id.)

In addition to fact discovery, Class Counsel's efforts also included: 1) researching the claims and meeting with Plaintiffs before filing the Burch action; 2) researching the law and preparing the complaints and amended complaints; 3) researching and preparing for the numerous motions filed throughout the litigation, including Plaintiffs' motion for FLSA conditional certification, motion for Rule 23 class certification, motions for summary judgment and Qwest's motion for decertification; 4) serving expert reports and conducting expert discovery; 5) preparing for and attending three mediations; and 6) preparing documents, including the individual settlement allocations, related to settlement and notice of settlement to the FLSA and Rule 23 classes. (Id. at ¶ 7.) Throughout these phases of the case, Class Counsel continuously attempted to move the case along expeditiously, limit duplicative efforts, and minimize the use of judicial resources in the management of the case.

Finally, Class Counsel is self-administering the settlement to devote more funds to the Settlement Class members, rather than allocating a portion of Plaintiffs' settlement funds to a third-party settlement administrator. The tasks involved in administering the settlement include: (1) preparing and mailing notice of the settlement, (2) processing the claim forms received, (3) re-mailing the notice of settlement to individuals who did not respond, (4) following-up with Settlement Class members who did not respond, and (5) answering questions from Settlement Class members regarding the settlement. (Id. at ¶ 8.)

Class Counsel dedicated extensive time and put forth great effort into this Litigation, and accordingly, this factor weights in favor of fee approval.

6. There is No Opposition to the Requested Fee Award.

Settlement Class members have been informed, through the Court-approved notice, that Class Counsel may request fees in the amount of $1,566,666.67, and no Settlement Class member has submitted an objection to the same. (Desai Decl. at ¶ 9.) Similarly, Qwest does not oppose the requested fee amount. Thus, this factor, too, weighs in favor of granting Class Counsel's request.

7. The Requested Fees are Comparable to Fees Awarded in Similar Cases.

Class Counsel's requested fees of $1,566,666.67 are reasonable in relation to the $4,711,537 settlement. Class Counsel requests one-third of the common fund, which, in this Circuit, is a common award for attorneys' fee in class action and FLSA collective action cases. See, e.g., Sanderson, 2011 WL 6369395, at *2 (approving an attorney fee award of 33.78 percent of the settlement fund in an FLSA collective action); Yarrington, 697 F. Supp. 2d at 1064-1065 (internal citations and quotations omitted) (collecting cases and granting award of 33 percent); Wineland v. Casey's Gen. Stores, Inc., 267 F.R.D. 669, 677 (S.D. Iowa 2009) (approving an attorney fee award of 33.33 percent of the $6.7 million settlement fund in an FLSA wage and hour action); Carlson, 2006 WL 2671105, at *8 (approving a fee award of 35.5 percent of the $15,000,000 settlement fund in a class action lawsuit); In re Xcel, 364 F. Supp. 2d at 998 (acknowledging that courts in the District of Minnesota routinely approve fee awards of 33 percent in class actions); In re Monosodium Glutamate Antitrust Litig., No. 00MDL1329-PAM, 2003 WL 297276, at *3 (D. Minn. Feb. 6, 2003) (awarding 30 percent in attorney fees from a $81.4 million settlement in a class action lawsuit).

Here, Class Counsel's requested award in this wage and hour class and collective action falls directly in line with fees awarded in similar cases. For this reason, the Court should approve Class Counsel's requested attorneys' fees award.

B. Class Counsel's Request for Attorneys' Fees is Also Reasonable Under the Lodestar Analysis.

The Eighth Circuit has held that the lodestar approach is "sometimes warranted to double check the results of the 'percentage of the fund' method." Petrovic, 200 F.3d at 1157. However, such an analysis is only a cross-check and "need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case." In re Xcel, 364 F. Supp. 2d at 999. As part of the cross-check, the lodestar is determined by multiplying the hours reasonably expended on the case by a reasonable hourly rate. Petrovic, 200 F.3d at 1157.

The lodestar multiplier "need not fall within any pre-defined range, as long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." In re Xcel, 364 F. Supp. 2d at 999 (citing In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 307 n.17 (3rd Cir. 2005)); see, e.g., Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 371 (S.D.N.Y 2002) (percentage fee resulted in a "modest multiplier of 4.65"); Di Giacomo v. Plains All Am. Pipeline, No. Civ. A.H.-99-4137, 2001 WL 34633373, at *10-11 (S.D. Fla. Dec. 19, 2001) (approving percentage fee resulting in a multiplier of 5.3).

Here, the lodestar method confirms that Class Counsel's requested fee is more than reasonable. Class Counsel devoted over 9,600 hours, resulting in a lodestar value of approximately $2,422,858 in this case. (Desai Decl. at ¶ 9; Ex. A, Summary of Fees and Fee Report.[2]) The fees sought represent approximately 65% of Class Counsel's loadstar amount. Class Counsel seeks no risk multiplier in this case, as their requested fee is significantly lower than the fees they actually expended and will expend further administering the settlement.

Class Counsel's billing rates used to calculate the lodestar amount are reasonable as well. In determining the reasonableness of an hourly rate, the Court should consider

[2] The Fees Report is the contemporaneous time records that Class Counsel kept in its normal course of business.

"the ordinary rate for similar work in the community where the case has been litigated." Emery v. Hunt, 272 F.3d 1042, 1048 (8th Cir. 2001.)

The majority of attorney fees were incurred by James H. Kaster ($600 per hour), Matthew H. Morgan ($450 per hour), Sarah M. Fleegel ($325 per hour), Reena I. Desai ($275 per hour) and several paralegals, legal assistants and case clerks who contributed throughout the six-year duration of this case ($175 per hour).[3] (See Ex. A, Fee Report.)

Nichols Kaster, PLLP, has extensive experience litigating wage and hour cases in Minnesota and throughout the country. (Kaster Decl. at ¶¶ 3-5.) Jim Kaster is a Partner at Nichols Kaster and has brought significant experience and expertise to this case. (Id. at ¶¶ 1, 6-7.) Matthew H. Morgan is also a Partner at Nichols Kaster. (Id. at ¶ 8.) Mr. Morgan has considerable trial experience and has been exclusively practicing employment law for over five years. (Id.) Sarah Fleegel graduated from William Mitchell College of Law in 2005 and practiced employment law as an attorney at Nichols Kaster from 2005 until 2009. (Id.) Reena I. Desai is a fifth-year associate at Nichols Kaster and devoted the last three years of her practice to exclusively collective and class action wage and hour cases. (Desai Decl. at ¶ 5.) Finally, the case could not have been successfully litigated without the assistance of several staff members who worked on the lawsuit over the last six years. (Kaster Decl. at ¶ 9).)

[3] Because of the extent of discovery and long duration of this lawsuit, several staff members have worked on the file since the case was initiated. (Kaster Decl. at ¶ 9.) The staff members include paralegals, legal assistants, and "case clerks," who are highly skilled legal assistants integral to litigating the case. (See id.)

Further, Class Counsel's rates, which were used to determine the lodestar amount, are within the range of rates for comparably experienced employment law attorneys and staff in the Minneapolis market. (See Ex. D, Affidavit of Susan Coler at ¶ 6 (submitted in support of Plaintiffs' Motion for Attorneys' Fees, ECF No. 510, in Brennan v. Qwest Corp., No. 0:07-cv-02024-ADM-JSM (D. Minn).))[4]

Because Class Counsel's request for attorneys' fees is also reasonable using the lodestar cross-check method, its motion for an award of $1,566,666.67 should be granted.

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUESTED COSTS.

A. Costs of Prosecuting this Litigation

Costs incurred to date by Class Counsel total $738,080.64, but respectfully request reimbursement for a portion—$535,540.42—of these total costs.[5]

Class Counsel has incurred significant out-of-pocket expenses throughout the course of the litigation, with the substantial risk of no recovery. These expenses include costs related to courier services, court fees, deposition transcripts, mediation,

[4] Class Counsel served as plaintiffs' counsel in Brennan v. Qwest Corp., a FLSA collection action. Class Counsel's lodestar in Brennan was $1,879,880 based on the same rates presented in this motion, and Judge Montgomery awarded Class Counsel its requested fees of $1,000,000. See Brennan, No. 0:07-cv-02024-ADM-JSM (D. Minn), ECF No. 520, Order granting Motion for Attorney Fees; id., ECF No. 509-1, Summary of Time Entries.

[5] Class Counsel has discounted its requested costs by approximately $160,400 to account for expert fees charged to and paid by Class Counsel for its first retained expert—ERS Group. The total amount Class Counsel paid to ERS Group for its expert services was $432,157.68. Given the high amount, Class Counsel does not believe it is fair to charge the classes for the entire amount of the expert fees incurred, and has accordingly absorbed a portion of it, requesting $271,749.61 for fees paid to ERS Group through this motion.

photocopies, postage, travel, expert fees and legal research. (Ex. B, Summary of Costs.) All of these costs were necessary in connection with litigating and in resolving this case and are reimbursable. See, e.g., Yarrington, 697 F. Supp. 2d at 1067 (approving reimbursement for expenses including "filing fees; expenses associated with research, preparation, filing, and responding to the pleadings in this matter; costs associated with copying, uploading, and analyzing documents; fees and expenses for experts; and mediation fees."); In re UnitedHealth Grp. Inc. S'holder Derivative Litig., 631 F. Supp. 2d 1151, 1160 (D. Minn. 2009) (awarding plaintiffs' counsel a total reimbursement of $514,591.78 for the expenses counsel advanced during the litigation); In re Xcel, 364 F. Supp. 2d at 999-1000 (granting plaintiffs' counsel's reimbursement request of $481,422.94 for expenses such as "photocopying, postage, messenger services, document depository, telephone and facsimile charges, filing and witness fees, computer assisted legal research, expert fees and consultants, and meal, hotel, and transportation charges for out-of town travel."); In re BankAmerica Corp. Sec. Litig., 228 F. Supp. 2d 1061, 1066 (E.D. Mo. 2002) (awarding approximately $1.7 million to plaintiffs' counsel as reimbursement for out-of-pocket expenses advanced during the litigation including "expert witnesses; computerized research; court reporting services; travel expenses; copy, telephone and facsimile expenses; mediation; and class notification.")

Class Counsel's costs sought are reasonable and should be awarded.

B. Costs of Settlement Administration.

The Settlement Agreement provides that Class Counsel may use settlement funds allocated to Non-Responding Settlement Class members (i.e., unclaimed funds) to defray actual costs of settlement administration. (ECF No. 507, Redacted Settlement Agreement, Section B.2.c.) Class Counsel requests an amount of $4,577.25 in costs incurred to date related to administering the settlement. (Desai Decl. at 10, Ex. C, Summary of Settlement Administration Costs.) These requested expenses include costs related to postage, paper and envelopes for the Notices of Settlement and associated reminder letters. Class Counsel also requests an additional $1,334.91 in anticipated costs to complete the administration of settlement, including postage and envelope expenses related to mailing the settlement checks. (Id.) Any unused portion will be donated to the designated cy pres beneficiary.

III. THE REQUESTED SERVICE PAYMENTS ARE REASONABLE.

Service payments are commonly recognized by courts and promote the public policy of encouraging individuals to take on the responsibility of representative lawsuits. See, e.g., In re U.S. Bancorp, 291 F.3d at 1038; In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000); Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998); Yarrington, 697 F. Supp. 2d at 1068; Wineland, 267 F.R.D. at 676; In re Xcel, 364 F. Supp. 2d at 1000.

Here, Plaintiffs request the service payment of $1,000 to Named Plaintiff Felicia Burch, in addition to the amount she would otherwise receive as her appropriate pro rata share of the settlement amount. Plaintiffs also request a $200 service payment for each of the 41 plaintiffs, in addition to the amount they would otherwise receive as their appropriate pro rata share of the settlement, for preparing for and sitting for their depositions. Qwest does not oppose these requests.

A. Named Plaintiff Burch's Requested Service Payment is Reasonable.

The Court should award the modest service payment of $1,000.00 to Named Plaintiff Felicia Burch. The Eighth Circuit provides several factors for the district court to examine when deciding whether a service award for the named Plaintiffs is warranted. Koenig v. U.S. Bank, 291 F.3d 1035, 1038 (8th Cir. 2002). The Court should look at the "actions plaintiff took to protect class's interests, [the] degree to which the class has benefitted from those actions, and [the] amount of time and effort plaintiff expended in pursuing litigation." Id. Service payments are "particularly appropriate in the employment context," where, as here, the Named Plaintiff is a former or current employee of the defendant. Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

Plaintiff Burch actively participated in the case to the benefit of all the class members. Specifically, she participated in several interviews by telephone and in-person by Class Counsel in the last six years, including pre-suit. (Desai Decl. ¶ 11.) Plaintiff Burch was instrumental in Class Counsel's ability to initiate the action, and Class Counsel gained valuable information regarding case strategy and fact discovery from Plaintiff Burch throughout the lawsuit. (Id.) Further, Plaintiff Burch responded to discovery requests, sat for her deposition, and submitted testimony in support of Plaintiffs' motion for conditional certification, (ECF No. 70, Ex. D at 3-4), and Plaintiffs' motion for Rule 23 class certification, (ECF No. 315, Ex. 39).

Finally, the service payment of $1,000.00 is reasonable and appropriate given its modest size and the success of the litigation. The payment will not significantly reduce the amount of settlement funds available to the remaining plaintiffs. Indeed, a $1,000.00 service payment constitutes merely 0.02 percent of the settlement amount. Courts throughout the Eighth Circuit and other circuits regularly award service payments in excess of $1,000. See, e.g., Yarrington, 697 F. Supp. at 1068-69 (approving a $5,000 service award for each of the named Plaintiffs); Zilhaver, 646 F. Supp. 2d at 1085 (finding that the two name plaintiffs were entitled to individual service awards of $15,000); In re Xcel, 364 F. Supp. 2d at 1000 (awarding $100,000 to be distributed among the eight lead plaintiffs); In re Sprint Corp. ERISA Litig., 443 F. Supp. 2d 1249, 1271 (D. Kan. 2006) (awarding $5,000 to named plaintiffs as an incentive payment); Nilsen v. York County., 382 F. Supp. 2d 206, 215 (D. Me. 2005) (approving incentive payments of $5,000-$5,500 for named Plaintiffs). Because the requested service payment is reasonable and appropriate, Plaintiffs respectfully requested that it be awarded.

B. The Court Should Award a Service Payment to Plaintiffs who Qwest Deposed.

Plaintiffs request a modest service payment of $200.00 to each of the 41 plaintiffs who Qwest deposed. Each class member took the time and incurred the expense of (1) preparing for his deposition, (2) traveling to and from the deposition site, (3) missing work or other obligations for the deposition, and (4) sitting for the deposition. The deposition testimony was integral to the case, as it provided relevant information that moved the case towards an efficient resolution. Courts regularly award service payments to plaintiffs for their time and energy spent preparing for and at their deposition. See, e.g., Wineland, 267 F.R.D. at 677-78 (awarding $1,000 to each class member who was deposed); Nilsen, 382 F. Supp. 2d at 215 (awarding $500 to each plaintiff who was deposed).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant Class Counsel's Motion for Attorneys' Fees, Costs, and Plaintiff Service Payments, and enter an Order awarding (1) Class Counsel $1,566,666.67 in fees; (2) $535,540.42 in costs; (3) $4,577.25 in costs related to settlement administration and an additional $1,334.91 for anticipated costs; (4) a service payment for Named Plaintiff Burch in the amount of $1,000.00; and (5) a service payment of $200 to each plaintiff deposed by Qwest.

Dated: August 31, 2012

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